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INTRODUCTION

The 1960 *Kentucky Law Journal* was devoted largely to a symposium[1] on the Uniform Commercial Code which became effective in this Commonwealth on July 1, 1960. The only major section of the Code not discussed in the symposium was Article 2 on Sales. The occasion for this article is the need for an introductory treatment of the more important provisions of Article 2, with emphasis upon changes in Kentucky law. Detailed studies of changes made by Article 2 in Warranty Law[2] and Buyers' and Sellers' Remedies[3] also appear in this issue.

Though Article 9 has been described as the heart of the Code, Article 2 is half again as long[4] and its coverage is vast. After all, much has happened in the more than fifty years since the chief statute, codifying and clarifying this branch of the law, was first promulgated.[5] In fact the initial impetus for the revised uniform legislation in the entire commercial field came from the sales area. In 1940 a federal sales act was proposed in Congress.

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[1] Both Winter and Spring issues, 48 Ky. L. J., 191-250, 333-429 (1960). These articles were based upon a Short Course on the Uniform Commercial Code held at the University of Kentucky, June 23-25, 1959, and sponsored by the University of Kentucky, College of Law, the University of Louisville School of Law and the Kentucky State Bar Association, with the cooperation of the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association.

[2] Note, "The Uniform Commercial Code and Greater Consumer Protection under Warranty Law", 49 Ky. L.J. 240 (1961).

[3] Note, "A Comparison of the Rights and Remedies of Buyers and Sellers Under the Uniform Commercial Code and the Uniform Sales Act", 49 Ky. L.J. 270 (1961).

[4] By author's count from the bill which was enacted (Senate Bill No. 169, 1958), approximately 1930 lines in the Sales article as compared with 1230 lines in Article 9.

[5] It was in 1906 that the Uniform Sales Act was first proposed for enactment by the states by the Commissioners on Uniform State Laws. It was first enacted by Arizona and Connecticut in 1907, and is now the law in thirty-seven states. It will hereafter be abbreviated "USA" in the footnotes.

Subsequently a Revised Uniform Sales Act for state adoption was drafted under the auspices of the National Conference of Commissioners on Uniform State Laws, which was withdrawn in favor of the more comprehensive Uniform Commercial Code, undertaken as a joint project of the Commissioners and the American Law Institute.

Article 2 replaces the Uniform Sales Act, which Kentucky has had since 1928 and which was itself largely a codification of common law cases governing the sale of most types of personal property.[6] It also codifies and expands a great deal of the law of Contracts and other applicable principles developed judicially. In several important respects a fundamentally different approach to the solution of problems will be found.

Criticisms have ranged from protests that the new sales provisions depart too radically from established law[7] to a belittling of its provisions as mere duplication of the "existing uniform statutes already adopted in an overwhelming majority of the jurisdictions."[8] In addition the Code's length, complexity, and new terminology have been noted as requiring "learned commentaries alien to our common law system . . . [and] . . . a relitigation over the next century of the law of sales as previously worked out by the courts . . ."[9] Since the pros and cons have already been well debated by the great masters,[10] this article will

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[6] Ky. Acts 1928, ch. 148, p. 481, which became Chapter 361 of Ky. Rev. Stats, repealed by the Legislature in enacting the Uniform Commercial Code, Ky. Acts 1958, Ch. 77, p. 214, now Ky. Rev. Stat. Ch. 355. The Uniform Commercial Code will be abbreviated "UCC" in the footnotes. It has become effective at the time of this writing in five states, Pennsylvania, Massachusetts, Kentucky, Connecticut and New Hampshire.

[7] Chief among these critics has been Professor Williston, draftsman of the Uniform Sales Act for the Commissioners on Uniform State Laws. He states that it ". . . proposes many rules which have never existed anywhere, and often adopts unusual language". Williston, "The Law of Sales in the Proposed Uniform Commercial Code", 63 Harv. L. Rev. 561, 565 (1950). This is intended by way of contrast to the Uniform Sales Act, which was based largely upon common law rules and therefore did not render the law in the states adopting it radically different from the law in the approximately one-fourth the states which have never adopted it.

[8] Beutel, "The Proposed Uniform (?) Commercial Code," 61 Yale L.J. 334, 353 (1952).

[9] Murphy, "Sellers' Remedies Under the Amended Uniform Commercial Code in Pennsylvania," 33 Temple L.Q. 273, 292 (1960).

[10] Corbin, "The Uniform Commercial Code—Sales; Should it be Enacted?" 59 Yale L.J. 821 (1950); Gilmore, "Uniform Commercial Code; A Reply to Professor Beutel", 61 Yale L.J. 364 (1952); Williston, "The Law of Sales in the Proposed Uniform Commercial Code", 63 Harv. L. Rev. 561 (1950); Beutel, "The Proposed Uniform (?) Commercial Code," 61 Yale L.J. 334, 353 (1952);

(footnote continued on next page)

leave to the readers' individual and collective judgments the ultimate evaluation of the merits of the criticism and will instead outline the main changes in the law.

Two-fold aspect of a sale: What is a "sale" transaction which is the subject matter of this branch of the law? Almost all sources—the law merchant, the common law courts, text writers, the Uniform Sales Act,[11] the Uniform Commercial Code[12]—have agreed substantially upon the classic definition of a sale as an agreement whereby the seller transfers the general ownership of some specific chattel to the buyer for a consideration called the price.[13] Thus, a sale has two aspects (1) the agreement and (2) the transfer of the ownership of the thing sold. Most lawyers will recall that the bulk of the subject matter of traditional law school sales courses dealt primarily with the latter aspect, and it is true that most litigation has revolved about the question of the "property interest" or "title". This was because a determination of whether and when the title in goods had passed from seller to buyer was controlling in regard to so many issues.[14] There were, of course, many sales questions relating to the first aspect of the transaction, the contract or agreement. This contractual aspect, however, was usually treated under the heading of contract law rather than sales, because the principles governing the validity and construction of sales contracts were generally the same as for other contracts. It is primarily the highlights or differences in approach in these two aspects with which this paper is concerned.

The main features of Article 2 are (1) a lessening of the importance of the concept of title in favor of a narrow issue

(footnote continued from preceding page)
Hall, "Article 2—Sales—From Status to Contract?" 1952 Wis. L. Rev. 209; Latty, "Sales and Title and the Proposed Commercial Code", 16 L. & C. P. 3 (1951); Rabel, "The Sales Law in the Proposed Commercial Code", 17 U. of Chi. L. Rev. 427 (1950); Waite, "The Sales Law in the Proposed Commercial Code", 48 Mich. L. Rev. 603 (1950).

[11] U.S.A. § 1 (2).

[12] §2-106(1). A sale, as under the Sales Act, is defined to consist in the transfer of title from the seller to the buyer for a price. The language, "contract for" may include either a present sale or a contract to sell goods in the future.

[13] Vold, Sales §3(2d. ed. 1959). A sale is "a transmutation of property from one man to another in consideration of some price or recompense in value". 46 Am. Jur. *Sales* §2 (1943).

[14] See *infra*, text at footnotes 37-42. The words "title" (USA, §23) and "property interest" (USA §17, ffg.) are for practical purposes interchangeable. Braucher & Sutherland, "Commercial Transactions: Text, Forms, Statutes", 23 (1958).

approach which details specific legal consequences for different factual situations, and (2) a departure from many accepted principles of contract law in recognition of actual business practices in modern day sales transactions. In addition, there is a substitution of much new terminology, which is based upon the language used by business men instead of the legal terms with which lawyers and courts have become accustomed to express their conclusions. There is also an important distinction between the casual sale between two individuals and sales by and between "merchants" as that word is defined in the article. Each of these principal changes requires special detailed treatment to follow.

Importance of definitions: The first job faced by the practitioner in respect to this new statute is acquiring the technique of finding his way around the whole statute. Although the sales article as a unit complete in itself can perhaps be better understood than other parts of the Code, even it must be studied in the light of the definitions and general principles of construction found in the introductory Article 1,[15] whose provisions have relevance throughout the remaining nine articles. Article 2 also has its own list of definitions as well as an index of definitions to be found in other sections of that article.[16] These, of course, are applicable only within Article 2. Furthermore, the comments to each section contain a list of cross-references as well as "definitional cross-references" to other sections, which must frequently be examined to determine the exact meaning of words. Taken together, there is a maze of provisions, in which the practitioner under the Code must gradually learn to find his way about.

It is little wonder then that critics have pointed out that the Code is difficult because it is complex. The fact remains that precise and accurate definitions with qualifications and supplementary definitions are absolutely necessary to adequate coverage of such a vast and sprawling body of case and statutory law. Lest we give it up as a bad endeavor too soon, I suggest two steps

[15] UCC §§1-201 through 1-208. Especially relevant to Article 2 are the following definitions: §1-201(9) defining "buyer in ordinary course of business"; §1-201(17) defining "fungible"; §1-201(19) defining "good faith"; §1-201(26)(27) relating to "notice". §1-204, relating to action taken within a "reasonable time" and "seasonably", and §1-205, relating to "course of dealing and usage of trade", also contain pertinent definitions.

[16] UCC §§2-103 through 2-107.

for a better initial understanding of Article 2. First, read Article 2 completely through, without the comments or explanations or cross-references (not quite like a novel, it is true), in an effort to see what is covered and the plan of organization. Next, since proof of utility is in the use, try the article as a reference work for the answer to a specific problem. It is submitted that the lawyer's criticisms will vanish when he sees how readily and how completely the Code provides the answer, as contrasted with the time spent in examination of the Sales Act and in finding the ambiguous and conflicting court decisions.

Illustration of the labyrinth of definitions important for the practitioner to examine, may be found in the provisions regarding good faith and merchants. "Good faith" in the case of a "merchant" is defined to include both "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".[17] This does not mean that sellers and buyers of the non-merchant category are bound by no standards at all. For them it is necessary to look, however, to the general definitions applicable throughout the entire Code to find that "good faith" is "honesty in fact",[18] substantially the same as the single definition in the Sales Act, applicable to all persons whether merchants or not.[19]

Many legal consequences throughout Article 2 depend upon whether the transaction is between merchants or whether the individual buyer or seller to be affected is a non-merchant. Therefore, it may become very important to examine the definition of "merchant in section 2-104 as well as the types of situations where this distinction may become controlling. Under the Code definition, a merchant may be not only "a person who deals in goods of the kind" involved, but also one who "otherwise by his occupation holds himself out as having knowledge or skill peculiar" to either the goods or the business practices. Comment 1 to section 2-104 states that the nature of the provision will determine what kind of specialized knowledge will constitute one a merchant. This may not always be easy of application, but it will be material to the issues. The policy, based upon experience reflecting the necessity of clear rules governing transactions

[17] UCC §2-104.
[18] UCC §1-201(19).
[19] USA §76(2).

between professionals, is to state rules between merchants and as against a mrchant when needed instead of simply to leave the court to the circumstances or trade usage in each case as did the previous statute.[20] Some of these specialized rules, which appear only in Article 2, rest upon normal practices in any type business and with which every person engaged in business should be familiar; a second group of rules prescribe special legal consequences only where a party is a merchant with respect to the particular type goods involved; while still a third type of rule has reference to "reasonable commercial standards of fair dealing in the trade", applicable to persons who are merchants under either the "goods" or the "practices" aspect of the definition of merchant.[21]

Critics of this categorization point to its novelty and the fact that it attempts to create two separate commercial laws based upon the type persons involved in the transaction rather than merely upon the facts of each case. It is well to remember, however, that the classification is not really as novel as it may seem. The early "law merchant" was a special body of rules developed by merchants to govern dealings among themselves and was based upon their customs and practices. The common law courts gradually applied these rules generally to commercial transactions affecting not only merchants but other persons. A recognition of the fact that professionals in different trades have continued to develop special rules of their own to meet changing business needs, may be seen not only in the weight given trade usage and custom, but also in the judicial limitations cutting down such usage to proper size and area.[22] In this respect the Code provision may be considered to make explicit what the courts have been doing anyway by applying these specialized rules only to knowledgeable persons in the trade and not to the casual buyer or seller unfamiliar with the trade usage or custom. For several limited situations the Uniform Sales Act, too, had kindred provisions, distinguishing persons "in the know" from others. For example, the warranty of merchantability is limited to goods bought from "a seller who deals in goods of that kind or descrip-

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20 UCC §2-104, Comment 1. *Cf.* USA §71, 45(2).

21 *Id.*, Comment 2.

22 For an excellent discussion of limitations, i.e. reasonableness, certainty, legality, etc., see Note, 55 Columb. L. Rev. 1192, 1198 (1955).

tion";[23] and the implied warranty of fitness for particular purpose is recognized "when annexed by the usage of the trade."[24] Furthermore, the effect of custom upon all sales transactions is expressly recognized.[25]

Subject matter and scope of Article 2: Sales and contracts to sell "goods" are what Article 2 is talking about, as was true under the replaced statute.[26] But goods are defined broadly to mean "all things movable", avoiding use of the common law and Sales Act term "chattels personal."[27] In addition to movable things, section 2-105 includes within the definition of goods (1) the unborn young of animals, (2) growing crops, and (3) things attached to the realty pursuant to certain conditions prescribed in section 2-107.

The sales article makes clear that transactions other than sales of goods, e.g., sales of realty or contracts for services, are not within its scope.[28] Specifically relieved from operation of Article 2 are (1) "transactions . . . intended to operate only as a security transaction", to which Article 9 would be applicable, (2) "any statute regulating sales to consumers, farmers or other specified classes of buyers", (3) "money in which the price is to be paid", (4) "investment securities", to which Article 8 applies, and (5) things in action.[29] Thus, the exclusions from coverage correspond substantially to the Uniform Sales Act.[30]

Since the exclusion is for transactions intended to operate "only" as security transactions, the article would be applicable to the sales aspects of security transactions under which the seller retains a security interest such as a conditional sale or a purchase money mortgage.[31] Thus the sales aspects of such transactions are governed by this article, whereas the security aspects would

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[23] USA §15(2).
[24] USA §15(5).
[25] USA §71.
[26] UCC §2-105(1)(2); USA §5.
[27] UCC §2-105(1) and USA §76.
[28] UCC §2-103.
[29] UCC §2-105. Although "things in action" are not defined, the example which comes to mind (other than the articles specifically excluded, such as the one relating to investment securities) is Commercial Paper, regulated by Article 3.
[30] USA §75 read as follows:

> The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

[31] Cartwright v. C.I.T. Corp., 253 Ky. 690, 70 S.W. 2d 388 (1934).

be governed by Article 9. If the transaction is intended to operate only as security, the Code excludes application of Article 2 even though the transaction is "in the form of an unconditional contract to sell or present sale. . . ."[32] It is not always clear whether a given transaction is intended to be a sale or a security transaction, since parties often disguise a security device in the form of an absolute sale.[33] As between the parties, courts will look to the real intent and examine the substance rather than the form. Thus we may still expect the same problem, with the same principles governing its solution, to arise in the future as in the past under the Uniform Sales Act.

The Code's preservation of certain legislation affecting consumers, farmers, or special types of buyers, is consistent with its coverage and desirable. An example of this type legislation in Kentucky is the Retail Installment Sales Act affecting Motor Vehicles,[34] and any future legislation in line with a national trend for the protection of installment purchasers generally.[35]

The exclusion only of "money in which the price is to be paid" shows by implication that sales of money as a commodity, e.g., foreign currency in some situations,[36] are intended to be within the scope of article 2's coverage.

DELIVERY, TITLE AND RISK

Importance of title: As attested by the volume of litigation in Kentucky as well as in other states, with or without the Uniform Sales Act, the great game in sales has been to find the location of the "property interest" or the "title" to the goods as between buyer and seller. This has been true because a great variety of legal consequences were resolved by determination of the title

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[32] UCC §2-102.

[33] Vold, Sales § 26 (2d. ed. 1959); Dollar v. Land, 184 F. 2d 245 (App. D.C. 1950), cert. den. 340 U.S. 884; Barker Candy Co. v. Commercial Security Co., 93 Conn. 129, 105 A. 328 (1918); *Cf.* Cartwright v. C.I.T. Corp., *supra* note 31, at 694.

[34] Ky. Acts. 1956, ch. 105. Ky. Rev. Stat. §190:090-990, entitled "The Motor Vehicle Retail Installment Sales Act".

[35] There are excellent recent studies of such legislation. See Warren, "Regulation of Finance Charges in Retail Installment Sales", 68 Yale L.J. 839 (1959); Britton and Ulrich, "The Illinois Retail Installment Sales Act—Historical Background and Comparative Legislation", 53 Northwestern U.L.R. 137 (1958).

[36] UCC §2-105, Comment 1; Richard v. American Union Bank, 253 N.Y. 166, 170 N.E. 532 (1930) ((Judicial construction of Uniform Sales Act to apply when money is dealt in as a commodity, as in contracts to supply of foreign currency).

question: the risk of loss,[37] the seller's right to the purchase price,[38] the buyer's right to the goods,[39] various public burdens and responsibilities such as taxes upon the goods,[40] and not least important, the rights of third parties such as creditors or a trustee in bankruptcy of the buyer party or seller party.[41] When title passed, title passed, and we could all go home, whatever the specific issue. The Code aims to deemphasize the importance of this conceptualistic approach by providing instead the legal consequences for the varying factual situations. In the language of section 2-401:

> Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.

These specific provisions appear throughout the article, some important examples being the provisions regarding risk of loss,[42] the seller's right of action for the price,[43] and the buyer's right to obtain the goods.[44] In dealing with any specific problem the attorney must therefore look first for a Code provision determinative of the issue at hand, because the specific provision may render wholly immaterial the general rules for locating title set out in section 2-401.

The main advantage of this new "step by step performance or non-performance"[45] approach is expected to be in the elimination of the resort to the very difficult and uncertain inquiry as to the location of title in many situations where the contract is silent. Though title passage has always been considered to be dependent

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[37] Fragano v. Long, 4 Barn & C. 219 (K.B. 1825); Troy Refining Corp. v. Slagter Oil & Grease Co., 61 F. Supp. 369 (W.D. Ky. 1945).

[38] Lott v. Delmar, 22 N.J. 229, 66 A. 2d 25 (1949) (risk of loss follows title); Kampmann v. McInerney, 258 Wis. 432, 46 N.W. 2d 205 (1951) (title passage gives right to action for the price under USA §63(1).).

[39] Proctor & Gamble Co. v. Peters, White & Co., 233 N.Y. 97, 134 N.E. 849 (1922); Crowder v. Barnes Auto Co., 309 Ky. 623, 218 S.W. 2d 679 (1949).

[40] Pacific Grape Products Co. v. C.I.R., 218 F. 2d 862 (9th Cir., 1955); C. M. Hall Lamp Co. v. United States, 201 F. 2d 465 (6th Cir., 1953).

[41] Farmers & Merchants Bank v. Number Nine Coal Corp., 311 Ky. 329, 224 S.W. 2d 138 (1949); In re Browning Crane & Shovel Co., 133 F. Supp. 653 (D.C. Ohio 1955).

[42] UCC §§2-509, 2-510.

[43] UCC §2-709.

[44] UCC §§2-502, 2-716.

[45] UCC §2-401, Comment 1.

upon the intention of the parties,[46] the parties do not think in terms of passing the property ownership or title. Since the parties usually do not sufficiently indicate their intention regarding passage of title, the common law and the Uniform Sales Act provided "gap-filling rules" or presumptions regarding passage of title in specific situations.[47] Examination of case law under the Uniform Sales Act shows considerable confusion in developing the rules to be applied in given factual situations in regard to the frequently arising questions: (1) whether or not the parties' intention is sufficient to render unnecessary a resort to any of the gap-filling rules;[48] (2) if so, what is that intention?[49] (3) if not, which of the different gap-filling rules in the Sales Act is to be applied?[50] These are the types of difficulties the Code has sought to avoid.

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[46] USA §18; Vold, Sales §24 (2d ed. 1959); Williston, Sales §261 (rev. ed. 1948); Radloff v. Bragmus, 214 Minn. 130, 7 N.W. 2d 491 (1943).

[47] The necessity for these gap-filling rules, or presumptions, arises from the lack of intent of the parties in regard to the abstract concept of location of title. Vold, Sales, §24, pp. 129, 142 (2d ed. 1959). These rules, based upon common law decisions, are set out in USA §19 as "rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer". They govern "unless a contrary intention appears", hence their description as "gap-filling rules",

[48] See e.g. Crowder v. Barnes Automobile Co., *supra* note 39; Sadler Mach. Co. v. Ohio Nat. Bank, 202 F. 2d 887 (N.D. Ohio 1952) (shown intent that title pass prior to contemplated shipment).

[49] The Uniform Sales Act, §18, after providing that title to specific goods passes when the parties so intend, states: ". . . (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case". Although the hinging of title passage upon intention is supposed to apply only to identified goods (*infra* note 89), even the issue whether the goods are to be considered identified may in the last analysis depend upon intention, as in the grading and sorting cases (*infra* note 50).

Language which might seem to indicate unquivocally a present sale is often held to have a contrary result. For example, words such as "sold", "hereby sells" are often used loosely and, taken together with other provisions, are consistent with a contract to sell in the future. Rudy-Patrick Seed Co. v. Roseman, 234 Ia. 597, 13 N.W. 2d 347 (1944); Vold, Sales (2d ed. 1959) 139.

Delivery or payment, or both, in advance of sale, although facts evidentiary of sale at time of the bargain, are not conclusive. But postponement of delivery or payment, or both, would not prevent passage of the title under the presumption of section 19, Rule 1, that title passes to specific goods in a deliverable state at the time of the bargain. Nor would such postponement prevent title passage based upon intention if the goods are not considered to be in a deliverable state.

[50] There exists under the Sales Act first the problem of determining whether the goods fall under the category of specific goods, to which Rules 1 and 2 of §19 apply, or whether the goods are future or unascertained goods, to which Rules 4 or 5 apply. One example of a situation in which difficulty is encountered in classification appears in the cases involving the sale of an undivided share in a mass of goods. Hawkland, Sales and Bulk Sales 82 (1958); Vold, Sales 233 (2d ed. 1959); Pacific Grape Products Co. v. C.I.R., *supra* note 40.

Once it is determined that the goods are specific goods there is still the

(footnote continued on next page)

Risk of loss or damage to goods: Let us look at the specific issue approach in regard to risk of loss, that most frequently arising issue traditionally dependent upon locating title. The Code makes separate provision for the situations where there is proper performance by the parties and where there is a breach, repudiation or improper performance by one of the parties.[51] In the ordinary situation involving no fault, section 2-509 sets out detailed rules for several different factual situations, the general effect of which is to make risk dependent upon completion of seller's performance by delivery of possession and not upon transfer of title. Of course these risk provisions are subject to contrary agreement by the parties.[52] The result is generally in line with pre-existing law.[53] The risk passes to the buyer upon delivery to the carrier in the normal type of shipment contract, whereas in the destination type contract risk does not pass to the buyer

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problem of whether nothing remains to be done to place the goods in a deliverable state so that under the presumption of Rule 1 of §19 title passes at the time of the bargain, or whether on the other hand something remains to be done so that Rule 2 applies to prevent title passage until that thing is done (and, by inference, cause title to pass when done). One example of difficulty in making this classification is to be found in the cases involving such further acts as weighing, measuring, sorting, or testing. Although the English Sale of Goods Act recognized a common law distinction making title passage turn upon whether such acts were to be done by the *seller* (Sale of Goods Act, §18, Rule 3), the Uniform Sales Act omitted this provision. In the United States it is difficult to determine definite rules from the cases. Many cases have rejected the distinction turning upon which party was to do the weighing or grading, and look rather to the more realistic criterion of whether the further act is merely mechanical under definite external standards or involves personal judgment or discretion. Radloff v. Bragmus, *supra* note 46; Vold, Sales, §27, p. 155 (2d ed. 1959).

If the contract calls for future or unascertained goods to be manufactured and shipped by carrier, Rules 4 and 5 provide alternative solutions, either of which might reasonably be applied by a court to the same situation. Although §19 Rule 4(2) provides that ordinarily there is an "appropriation" (passing title to the buyer) when the seller delivers conforming goods to the carrier, §19, Rule 5, contains language which has been interpreted to prevent title passage until destination if the seller is to pay the freight. This has given rise to conflicting interpretation by the cases involving shipments where freight is paid by the seller. Some courts treat the freight payment provision as merely a price term, Lansdowne Distillery v. Duggan's Distillers Products Corp., 192 Md. 540, 64 A. 2d 727 (1949), other courts hold that the provision also prevents title from passing until destination, Meyer v. State Bd. of Equalization, 42 Cal. 2d 376, 267, P. 2d 257 (1954).

[51] §2-509, Risk of Loss in the Absence of Breach; and §2-510. Effect of Breach on Risk of Loss.

[52] UCC §2-509(4).

[53] Troy Refining Corp. v. Slagter Oil & Grease Co., *supra* note 37. Harvey Probber, Inc. v. Kauffman, 181 Pa. Super 281, 124 A. 2d 699 (1957) (delivery to carrier passes title to buyer along with the incidental risk of loss); Rudy-Patrick Seed Co. v. Roseman, 234 Iowa 597, 13 N.W. 2d 347 (1944) (contract "f.o.b." point of destination, does not pass title so as to enable buyer to maintain action of replevin).

until tender of delivery at destination. Reference to other sections of the article thoroughly clarifies when the seller's performance is complete upon shipment and when the contract is to be treated as a destination contract.[54] Likewise consistent in result with pre-existing law are the rules for goods not requiring shipment but which are transferred to the buyer while in the hands of a third party bailee, such as a warehouseman.[55] In a third situation involving neither the shipment contract nor goods in the hands of a bailee, however, there is an innovation in the law. If tender of delivery has been made but the goods are not yet received by the buyer, the risk is made to turn upon whether or not the seller is a "merchant". If the seller is a non-merchant the risk passes to the buyer upon tender of delivery, but if he is a merchant it does not pass until the buyer actually receives the goods. Why this distinction? The drafters in comment 3 explain their underlying theory that a merchant prior to taking of possession by the buyer continues control over the goods and therefore may be expected to carry insurance.[56] Elasticity in the Code definition of "merchant"[57] to include dealers in the kind of goods involved as well as those who otherwise appear to have special knowledge or skill seems to give the courts great leeway in determining merchant status. Exactly wherein this would depart from previous law can be seen in the judicial application, regardless of merchant status, of section 19, Rule 1, of the Uniform Sales Act, providing that the "property" (and hence risk) passes in specific goods to which nothing remains to be done at the time of the bargain (unless an intention otherwise appears).[58] Further, for future or unascertained goods, the title and risk would under previous law pass upon appropriation of such goods to the contract by either party with the other's assent, regardless of seller's merchant or non-merchant status.[59]

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[54] See §401 and §503, Comment 3, explaining that the intention is to make the shipment type contract the normal one with the destination type the variant one.

[55] UCC §2-509(3).

[56] UCC §2-509, Comment 3.

[57] UCC §2-104, discussed *supra* in text at notes 19, 20.

[58] See *e.g.* Harris v. Merlino, 137 N.J.L. 717, 61 A. 2d 276 (1948), (title to specific goods in a deliverable state passed to the buyer on the fall of the auctioneer's hammer, and from that point the risk of loss was upon the buyer regardless of the fact that the merchant retained possession).

[59] USA §19, Rule 4(a). *Cf. In re* Shipley Stove and Lumber Co., 29 F. Supp. 746 (E.D. Ky., 1939).

Nor do the provisions placing risk of loss upon the party who has breached the contract change previous law substantially, though the approach is changed. Previous law placed the risk upon a seller who made a non-conforming delivery[60] through a Uniform Sales Act provision that title would not pass in such cases. The new provision,[61] without mentioning title, simply says the risk remains upon the seller until his breach is cured or until the buyer accepts.[62] Though relating risk to breach is a completely new provision, the Uniform Sales Act had a similar provision affecting only the kind of breach or default involving delayed delivery by the seller, in which case risk remained upon the seller as to any "loss which might not have occurred but for such fault."[63] The latter qualification raised troublesome questions as to when a delay caused a particular loss. Another real change recognizes the facts of life regarding insurance on goods. Either party who finds himself in possession of goods which the other party ought to have—an aggrieved seller still in possession of conforming goods identified to the contract upon buyer's wrongful repudiation[64] as well as an aggrieved buyer in possession of non-conforming goods as to which he may "rightfully revoke his acceptance"[65]—may treat the risk of loss as falling upon the other party but only "to the extent of any deficiency in his effective insurance coverage". In this connection it should be noted that a new provision gives the buyer an insurable interest as soon as the goods are identified[66] to the contract.[67] Taken as a whole,

[60] USA §22(1) and §19, Rule 4. §19, Rule 4, stipulates as a condition for title passage that the goods unconditionally appropriated to the contract be "of that description and in a deliverable state." §22(a), placing the risk upon the buyer after delivery where the seller retains title merely for security purposes, contemplates goods delivered "in pursuance of the contract".

[61] UCC §2-510(1).

[62] For seller's opportunity to cure an improper tender, see UCC §§2-508 and §2-510, Comment 1. Acceptance and its effect is defined in §§2-606, 2-607.

[63] USA §22(b).

[64] UCC §510(3). [65] UCC §510(2).

[66] Identification of goods as those to which the contract refers is as near as the Code comes to the old replaced concept of "appropriation" of goods to the contract under the Sales Act (see §19, Rule 4, in reference to the passing of title to future or unascertained goods upon their appropriation to the contract). Appropriation was really another way of saying title had passed. Though not defined in the statute and a troublesome concept under the case law, it was considered to be the action of the seller or the buyer upon which, with the consent of the other party, the property in the goods would pass. Since under the Code, identification to the contract is a factual concept involving less than passage of the title, consent of the other party is not required for identification (UCC §§2-501, 2-704(1)(a)).

[67] UCC §2-501.

the changes in the incidence of risk of loss are not changes in the result reached, but rather in the use of specific provisions for specific facts instead of seeking to locate title, and consequently the risk, from various other facts.

An event which occurs everyday in the commercial field can best describe this new approach. Suppose S in Chicago is to ship ten refrigerators to B in Lexington at a stated price, say "$2000 F.O.B. Chicago, via Midwest Trucking Lines". It is understood that B is to pay against shipping documents, with the bill of lading made to S's order to be endorsed to B upon payment. A conforming shipment of the ten refrigerators described in the contract is made by S and the refrigerators proceed on the trucks toward Lexington but are totally destroyed en route, let us assume without insurance. If S sues B for the purchase price, recovery would probably be allowed under either the Code or the Uniform Sales Act. The reasoning, however, is entirely different. Under the Sales Act, section 63(1) allows the seller to recover the purchase price if title has passed. Section 19, Rule 4(a), is consistent with title passing under these facts. If goods are destroyed, the approach is the same because section 22, relating to risk of loss, simply makes the risk follow the title. At common law, too, risk is dependent upon locating the title, with exceptions not here material. Under the Code, on the contrary, the specific issues are readily determined by referring to provisions relating to these issues. First, there is section 2-709 which permits seller to recover the price when conforming goods have been applied to the contract and are lost "after risk of their loss has passed to the buyer". Then section 2-509, which covers risk of loss in various situations, provides that where goods are shipped by carrier the risk passes to the buyer when the goods are "duly delivered to the carrier", unless the contract requires delivery at destination.[68] The same result is reached although the goods are shipped under a reservation by the seller of an interest in the goods as security for his price, say under an order bill of lading with payment to be made by the buyer against the documents.[69] And for specific information as to the effect of the

[68] That the normal type requires seller to deliver to the carrier at point of shipment and not to the buyer at destination, see discussion at footnotes 54 and 87.
[69] UCC §2-401(1).

mercantile term "F.O.B.", the Code outlines the different commercial uses of that term. When the term "F.O.B. [the place of shipment]" is used, section 2-319 places upon the seller the "risk and expense of putting the goods into the possession of the carrier."

Rights, remedies and title: Not only risk of loss, but numerous other specific rights and remedies are also now determined by specific provision. For example, the seller's right to the price of goods identified to the contract depends upon his inability to effect a resale at a reasonable price, and his right to the price of goods shipped in conformity with the contract but lost or damaged, depends upon the passage of a commercially reasonable time after risk of loss has passed to the buyer.[70] Title is not mentioned. Similarly the buyer's right to goods which have been identified to the contract depends upon seller's insolvency and payment of an installment of the price[71] in the absence of special circumstances under which specific performance may be had,[72] again without any mention of title.

A complete discussion of rights and remedies of buyers and sellers, bringing out both property and contractual aspects of sales transactions in connection with particular remedies, appears in this issue.[73] The writer views as highlights the following:

(1) For both buyer and seller, the elimination of the harshness of the doctrine of election of remedies, which at times has operated to deny full relief;[74]

(2) For both buyer and seller, the extension of existing remedies arising upon the other party's insolvency;[75]

(3) For both buyer and seller, the elimination of unfortunate technicalities stemming mainly from the title approach in regard to determination of the amount of damages,[76] and, for the seller, provisions broadening his right of resale and the consequences of its exercise, which may profitably be compared with the buyer's right of "cover";[77]

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[70] UCC §2-709.
[71] UCC §2-502.
[72] UCC §2-716.
[73] See Note 3, *supra*.
[74] UCC §§2-703, 2-711, 2-720.
[75] UCC §§2-502, 2-702.
[76] UCC §§2-708, 2-712.
[77] UCC §§2-703, 2-706, 2-712.

(4) For both buyer and seller, the harshness of existing contract law, which sanctions in some cases a term which forces the other party to breach without opportunity to cure, has been been greatly alleviated;[78]

(5) For both buyer and seller, a provision which permits a reasonable testing of goods, as to which it is disputed whether they conform to the contract terms, without being held to have accepted or converted, as the case may be;[79]

(6) Some redefinition of what constitutes breach, repudiation and excuse, especially in regard to remedies for anticipatory repudiation and in connection with installment contracts;[80]

(7) For the buyer, some lessening of the ease with which waiver of the right of rejection may be found by stating the wrong ground of rejection;[81]

(8) For the buyer, elimination of some unfortunate distinctions between rescission and rejection of goods, giving rise to the necessity of manipulation of orthodox title passing doctrine;[82]

(9) For the seller, a new right to identify to the contract unfinished goods without fear of being held to have failed to mitigate damages.[83]

Also worthy of mention is the convenient listing of all the seller's remedies and of all the buyer's remedies.[84] These listings piece together the detailed description of remedies in the succeeding sections and afford the reader an idea of the completeness of the relief granted each party.

The user of the Code will also be concerned with a new statute of limitations, which changes both the length of time allowed for actions and when a cause of action accrues. The time is lengthened to four years, but the action accrues upon actual breach and not opportunity for discovery, the latter a very important change in suits based on breach of warranty.[85]

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78 UCC §§2-508, 2-511.
79 UCC §2-515.
80 UCC §2-609 through 2-612. Note the expression of rights in terms of "adequate assurance of due performance" when "reasonable grounds for insecurity arise" (§2-609).
81 UCC §2-605.
82 UCC §2-720, and *cf.* USA §69-2.
83 UCC §2-704.
84 UCC §2-703 (seller's remedies); §2-711 (buyer's remedies).
85 UCC §2-725.

How Title Determined: It has been noted that other specific Code sections may well render title passage immaterial, so that the reader may wonder why such elaborate provisions regarding title. A catch-all provision was considered desirable to cover any situations for which specific provision was lacking and title might therefore be a subject of legitimate inquiry. Further, the Code itself contains several provisions where title is made at least in part material.[86]

Section 2-401 adopts as a general principle the rule that title passes at the time and place at which the seller completes his performance with reference to the physical delivery of the goods and also clarifies this principle in respect to deliveries under different types of shipment contracts. The main question in shipment contracts has been whether the contract does or does not require the seller to deliver to a particular destination, for the answer to that question determines not only passage of title where material but also risk of loss and other rights and duties of the parties. The Code solution is to make the shipment type of carriage contract the ordinary one and the destination type the variant type, the latter requiring specific words that the goods be tendered at destination.[87] Although the Sales Act likewise provided that ordinarily a seller would be presumed (absent contrary intention) to have "unconditionally appropriated" goods to the contract upon delivery to the carrier, there was another seemingly conflicting presumption that title was not to pass

[86] E.g. UCC §§ 326, 2-402(1), 2-403(1). Comment 1 to §2-401 states: ". . . [T]his section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the "private" law.

[87] See especially, Comment 3 to §2-503. Title will ordinarily pass to the buyer upon delivery to the carrier, but if the contract requires delivery at destination, title passes upon delivery at destination. These provisions must be read in connection with other provisions detailing the duties of the seller in both the shipment and destination type contracts and also the provisions defining the exact meaning of various mercantile terms commonly used in shipment cases. All the provisions affecting the seller's obligation to deliver are pertinent to title: §2-308 relating to place of delivery, §2-309 relating to time of delivery, §2-307 relating to whether the contract calls for a single delivery or delivery in lots, and §2-503 specifying in detail the seller's duties in connection with tender of delivery and §2-504 on his duties where shipment is by carrier.

until destination if the seller was to "pay the freight or cost of transportation to the buyer."[88] The Code Comment 3 to Section 2-503 points out that the drafters omitted the Sales Act provision which had been interpreted to mean that seller's obligation to pay the freight was equivalent to an agreement to deliver at the named destination and intended instead to require a specific agreement to obligate the seller to deliver to the destination. Thus the Code clearly makes the seller's obligation to deliver at destination and assume the risk until the goods arrive independent of his obligation to pay the freight.

Although the terminology used may seem unfamiliar, the following additional rules in Section 2-401 constitute a restatement of recognized principles rather than change. Title to goods cannot pass under a contract for sale until the existing goods are identified to the contract.[89] This continues unimpaired the established idea that even a contract which purports to effect a present sale of future or unascertained goods will operate only as a contract to sell, which cannot become effective as a sale until the goods come into existence or become ascertained.[90] Also unchanged is the Uniform Sales Act rejection of the so-called doctrine of "potential possession" under which some common law courts purported to effect an exception to the requirement that the goods be in existence before there can be a present sale, which exception was occasionally applied to limited kinds of goods.[91] The rule that title will ordinarily pass to specific and identified goods at the time and place of contracting also seems to be a restatement of time-honored sales

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88 UCC §19, Rules 4(2) and 5. For cases opposite in result but with similar facts, either of which could have easily reached either result, title passing at shipment point or at destination, see Secor v. Charles H. Tompkins Co., 45 A. 2d 117 (Munic. Ct. Apps. D.C., 1946), *Cf.* District of Columbia v. Upjohn Co., 185 F. 2d 992 (App. D.C., 1950) and Dow Chemical Co. v. Detroit Chem. Works, 208 Mich. 157, 175 N.W. 269 (1919).

89 UCC §2-401(1) ("title to goods cannot pass prior to their identification to the contract"); §2-105(2) ("a purported present sale of future goods . . . operates as a contract to sell").

90 USA §5(3) (future goods), §17 (unascertained goods). The concept of present sale as a transfer effective upon the making of the bargain is continued in the Code, §2-106(1) last sentence.

91 USA §5(2) was generally conceded to have abolished any remaining potency of the common law doctrine of potential possession, and UCC §2-105(2) does the same thing. See, however, an interesting Note, " 'Potential Goods' in Kentucky Before and After the Uniform Sales Act," 31 Ky. L.J. 185 (1943).

law.[92] Just as familiar is the idea of divided property interests, to the effect that the seller's retention of an interest in the goods merely to secure the purchase price after shipment or delivery to the buyer does not prevent the general ownership from passing to the buyer.[93]

Section 2-401 makes only one really significant change from previous law on how title passage is determined. That change is the substitution of the language "unless otherwise explicitly agreed" for the language "unless a different intention appears", the qualification to the Uniform Sales Act gap-filling rules.[94] The purpose of the more stringent requirement of a specific agreement is to add to the certainty of application of the Code's title passing criteria, eliminating the broad leeway under the Sales Act for courts somehow to find an "intention otherwise" to render inapplicable section 19.[95] Though criticized,[96] the new law makes for certainty in prediction of results by means of positive rules instead of mere presumptions where there is no specific agreement.

Mercantile terms: Closely related to, and necessary to proper understanding of, the article's provisions regarding title and defining the parties' rights and duties respecting delivery of the goods and risk of loss are the precise definitions of the various merchantile symbols used in the shipment of goods—"F.O.B.", "F.A.S.", "C. & F.", "Ex-Ship" and other terms.[97] No comparable

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[92] UCC § 401(3) and see also §2-501(1) (a); USA §19 Rule 1. Tarling v. Baxter, 6 B. & C. 360 (K.B., 1827); Anderson Thompson, Inc. v. Logan Grain Co., 238 F. 2d 598 (10th Cir., 1956) (bagged seed); C. M. Hall Lamp Co. v. United States, 201 F. 2d 465 (6th Cir., 1953) (securities).

[93] UCC §401(1); USA §§ 19, Rule 4(2), 20, and see Vold, Sales §5 (2d ed., 1959).

[94] UCC §401(1); USA §19 preamble.

[95] UCC §501, Comment 3, states:

> The provision of this section as to 'explicit agreement' clarifies the present confusion in the law of sales which has arisen from the fact that under prior uniform legislation all rules of presumption with reference to the passing of title or to appropriation (which in turn depended upon identification) were regarded as subject to the contrary intention of the parties or of the party appropriating. Such uncertainty is reduced to a minimum under this section by requiring 'explicit agreement' of the parties before the rules of paragraphs (a), (b) and (c) are displaced—as they would be by a term giving the buyer to select the goods.

[96] Williston, "The Law of Sales in the Proposed Uniform Commercial Code," 63 Harv. L.R., 561, 570 (1950).

[97] UCC §§ 2-319; 2-326.

definitions are contained in the Uniform Sales Act. The "F.O.B." (free on board) term defined in section 2-319 will be of most frequent concern. "F.O.B." is used in connection with a definite place, usually either the place of shipment or destination. There are two possible interpretations, that the F.O.B. point is intended to be the point for passage of title, or, on the contrary, that using the term refers only to computation of the price. The court decisions are as likely in most jurisdictions to interpret the F.O.B. provision one way as another,[98] although most decisions involve other factors and contract stipulations as well as the isolated term itself. For the sake of certainty and conformity with prevailing business usage, Section 2-319 resolves the conflict by saying that F.O.B. is a "delivery term", under which F.O.B. place of shipment places on the seller the expense and risk of putting the goods in the carrier's posesssion[99] whereas F.O.B. place of destination places upon the seller the risk and expense of transportation to destination and tender there.[100]

Calling F.O.B. a "delivery term" means that it is a title term fixing the passage of title at the point named.[101] The section not only generally defines the term but also states the seller's specific delivery duties in regard to whether he must load on board the carrier or only place the goods in the carrier's possession for loading. Despite the fact that the literal meaning of the symbols is "on board", the issue is resolved by requiring specific language to place upon the seller the duty and expense of actually loading. Only if the term F.O.B. shipment or destination contains additional language calling for "F.O.B. vessel, car or other vehicle" (at the named place) does the seller have the additional responsibility of loading on board; otherwise his obligation may be satisfied by placing the goods on the loading platform or the siding at the place specified.[102] Contracts can now more easily be made definite in these particulars and should be so drafted. In fact, as comment 2 points out, failure so to specify can be disastrous in case of reshipment contracts specifying only the place and not the loading details. The specific definition of

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[98] See Notes 50 & 88 *supra*, and cases cited therein.
[99] UCC §2-319(1).
[100] UCC §2-319(2).
[101] Though "delivery term" is not defined, the connection with title becomes apparent when §2-319 is read with §2-401.
[102] UCC §2-319(3).

results of other terms used widely in overseas shipments, such as "F.A.S." (free alongside), "C.I.F." (cost, insurance, and freight), "C. & F." (cost and freight), will prove equally helpful when cases arise, although in inland areas these terms may be less frequently encountered. Clarification in line with the better reasoned cases should result from the provision to the effect that "C.I.F." is a delivery term, placing title and risk upon the buyer on shipment. Most decisions reach this conclusion, on the basis that the insurance for the buyer's benefit controls over any contrary implication which might be drawn from the fact that the price includes freight to destination.[103] The established commercial usage that in such cases the buyer is required to pay against the documents without awaiting arrival of the goods, and without an opportunity to inspect the goods, is recognized.[104]

The Code provision on the meaning of the term "no arrival, no sale", or similar language, has the advantage of making clear that only failure to arrive, not of the seller's own doing, will absolve the seller of liability for damages.[105] The seller is excused from damages if the failure of arrival is not attributable to his fault, but proper shipment must be made and the goods tendered if they do arrive. If only part of the goods arrive undamaged it is the buyer's choice to treat the contract as avoided or to take the unimpaired part with allowance against the price.[106]

Sale on approval vs. sale on return: No difficulty has arisen under the Sales Act in determining the difference between a "sale or return" and "sale on approval" type contract, for Section 19, Rule 3, makes a clear distinction in terms of legal consequences. Instead the difficulty has been in determining under which category any particular contract is to be classified.[107] If the contract is "sale or return" the property interest passes to the buyer party on delivery of the goods to him under the contract, but the buyer has the power to return the goods and

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[103] Vold, Sales, §33, p. 203 (2d ed., 1959); Smith v. Marano, 267 Pa. 107, 110 Atl. 94 (1920).

[104] Comment 1 to §2-319.

[105] UCC §2-324(a) and Comment 1.

[106] UCC §2-324(b); and see §2-613(b).

[107] Provision that "This outfit is subject to 30 days free trial" held to be sale on approval in Kennedy v. Clark, 103 Vt. 349, 154 A. 577 (1931); but provision that ". . . We may return it [weighing machine] with or without reason at any time within 30 days from date of arrival of the machine, instead of paying the purchase price" held to be "on sale or return" in Columbia Weighing Machine Co. v. Kleckner, 130 Misc. 861, 225 N.Y.S. 167 (N.Y. Supt. Ct., 1927).

"revest" title in seller; if, on the other hand, delivery to the buyer is "on approval" the seller does not part with ownership during trial but the prospective buyer may acquire ownership by signifying his approval.

The Code does not change this basic distinction between the two types of contracts. Instead it makes more definite the criteria for classification, adopting the common business understanding that a delivery for purpose of resale is automatically to be classified as a "sale or return", while a delivery to a consumer for use is automatically to be classified as a "sale on approval" (unless, in either case, as is true under most provisions of Article 2, the parties have made a specific agreement to the contrary).[108]

RIGHTS OF THIRD PARTY PURCHASERS AND CREDITORS

Effects of the Code's new approach on title extend beyond rights between buyer and seller to regulate acquisition of rights by third parties, the creditors and purchasers of the buyer and of the seller. The changes are far-reaching.

Third party purchasers: Section 2-403 is designed to "gather together a series of prior uniform statutory provisions and the case law thereunder and to state a uniform and simplified policy on good faith purchase of goods."[109] Perhaps the one statement of policy which goes beyond any previously recognized protection accorded to a good faith purchaser is subdivision (2), which states:

> Any entrusting of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

Note the three limitations upon the protection afforded: (1) the buyer must buy in the *ordinary course* of business; (2) the merchant he buys from must deal in goods of *that kind;* and (3) the goods must have been *entrusted* to the merchant. The "merchant" entrusted with possession is a merchant as defined in Section 2-104, subject to the added qualification of the instant section that he must also deal in that kind of goods. If, however, the merchant does deal in the sale of that kind of goods, it does not matter that the entrusting is for another purpose such as

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[108] UCC §2-326(1).
[109] UCC §403, Comment. 1.

storage or repair, functions which frequently may be within one of the merchant's lines of business. Buyers in the ordinary course of trade appear mainly in the purchase from inventory situation and are defined earlier in another part of the Code[110] to exclude buyers from pawnbrokers and buyers under circumstances falling within the bulk sales provisions.[111] Consistent with this provision, the secured transactions article recognizes that the holder of a security interest is subject to rights of buyers of this type even with knowledge of the fact of the security interest.[112] And a purchaser of fungible goods, such as grain from a warehouseman, is protected in his purchase even against the holder by negotiation of an outstanding negotiable warehouse receipt, under a provision in article 7 (Documents of Title).[113]

The provision does not radically depart from previous law merely by protecting a bona fide purchaser from a vendor in ordinary course against the owner of goods who has entrusted them to the vendor for the purpose of sale. Common law decisions as well as various Factors Acts have long given such a purchaser protection based upon actual or apparent authority to sell.[114] The major departure from accepted legal principle consists rather in providing that *any* entrusting of possession, whether for purpose of sale or under a bailment for storage, repair or other purposes, will suffice. Within the limits of its operative effect this provision is indeed a long step away from the general rule of *caveat emptor* toward *market overt.* Conflicting policy values of what circumstances call for protection of a bona fide purchaser as against protection of the original owner will no doubt be long debated.[115]

In addition to deliveries under bailments, entrusting goods with a dealer may include the buyer's leaving the seller in possession, with the result that a second buyer from the seller left in possession will prevail against the first buyer.[116] Section

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[110] UCC §1-201(9).

[111] Of course the latter fall within the provisions of Article 6.

[112] UCC §9-307. Under §9-307(1), however, a buyer of farm products from a person engaged in farming is denied protection against the secured party.

[113] UCC §7-205.

[114] Dudley v. Lovins, 310 Ky. 491, 220 S.W. 2d 978 (1949); Bell v. Dennis, 43 N.M. 350, 93 P. 2d 1003 (1939); Barthelemess v. Cavalier, 2 Cal. App. 2d 477, 38 P. 2d 484 (1934).

[115] See Vold Sales, §30 at 172-173, 181-184 (2d ed., 1959); Williston, Sales, §346(a)(b) (rev. ed., 1948).

[116] See Comment 2 to §2-403.

25 of the Uniform Sales Act is to the same effect, protecting a subsequent bona fide purchaser from the buyer who leaves the goods in seller's possession, and this has been applied by Kentucky decisions.[117] In this situation, in fact, the Code protection to purchasers may be more restrictive than the Sales Act in that the Code protects only purchasers in the ordinary course of business from a dealer, whereas the Sales Act extends its protection much more widely to include all bona fide purchasers.[118]

Other important aspects of the bona fide purchaser problem have also been re-thought and restated by the Code. The common law and Sales Act principles to the effect that as a general rule one can pass no better title to goods than he has, barring estoppel of the original owner, and that a person in possession under a voidable title can transfer good title to a bona fide purchaser for value, are both continued. This is the same distinction made by the Sales Act[119] under which a sub-purchaser, even though in good faith and for value, from a party in possession with void title would lose to the original seller, whereas the sub-purchaser would win if the party in possession had a voidable title. The Code, enlarging the voidable title area, has resolved conflicts in the decisions in favor of protecting the sub-purchaser from a vendee in possession under a transaction of purchase in each of the following situations:

(a) the transferor was deceived as to the identity of the purchaser.[120]
(b) the delivery was in exchange for a check which is later dishonored.[121]
(c) it was agreed that the transaction was to be a 'cash sale',[122] or
(d) the delivery was procured through punishable as larcenous under the criminal law."[123]

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[117] Adkins v. Damron, 324 S.W. 2d 489 (Ky. 1959) (return to seller for repairs is not the contemplated "continuous" possession under §25 of the Sales Act which enables the seller to transfer good title to a subsequent purchaser).

[118] "Purchaser in ordinary course of business" is defined in §1-201(9). Buyers protected as "bona fide purchasers" under the USA, §§24 & 25, included persons who took for "value" and in "good faith" as defined in §76.

[119] USA §§23, 24.

[120] UCC §2-403(1)(a); Dudley v. Lovins, 310 Ky. 491, 220 S.W. 2d 978 (1949) (buyer an imposter and check forger).

[121] UCC §2-403(1)(b), Dudley v. Lovins, *supra* Note 120.

[122] UCC §2-403(1)(c); Nashville Grain & Feed Co. v. American Co-op Ass'n, 203 Ky. 458, 262 S.W. 634 (1924) (by implication).

[123] UCC §2-403(1)(d), Arnett v. Cloudas, 34 Ky. (4 Dana) 299 (1836).

In Kentucky the court decisions in at least most of the above situations had already reached the same result, holding the vendee had acquired a voidable title, which could be transferred to a bona fide purchaser free of any right in the original vendor or owner to avoid.[124]

Creditors' rights: The rights of the creditors of the seller arise mainly in two situations: (1) where the seller is left in possession of the goods, and (2) where the seller makes a transfer subject to the statutes governing transfers of merchandise in bulk. In neither situation does the Code make radical changes in pre-existing Kentucky law.

First, the Code adopts the general principle of section 26 of the Uniform Sales Act that whether creditors of a seller left in possession of goods after sale have any rights to enforce their claims against the goods depends upon whether the seller's retention of possession is fraudulent under the state law where the goods are situated.[125] It adds, however, one very important qualification that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent. Kentucky statutory and case law has made retention of possession without recording fraudulent against creditors as a matter of law in all cases without discrimination as to circumstances such as type of seller, or how long or for what purposes possession is retained.[126] The old Kentucky statute should be amended consistent with the Code qualification.

The rights of sellers' creditors also require consideration of bulk sales legislation, a rather detailed subject too lengthy for this article. Suffice it to say that Article 6 of the Code on Bulk Sales replaces Chapter 377 of the Kentucky Revised Statutes with much more precise definition of coverage but without substantial change in the basic law. The essence of protection under the prevailing bulk sales statutes is that creditors of a seller or transferor of a substantial portion of a merchant's stock

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[124] See Notes 120, 121, 122 and 123.

[125] UCC §2-402(1).

[126] KRS §378.040 provides in part:

> Except as provided by KRS 364.120, any alienation of or charge upon personal property unaccompanied by a transfer of possession . . . shall be void as to . . . any creditor, prior to the lodging for record such transfer or charge. . . .

of merchandise may avoid the transfer as against the transferee to the extent of their claims unless certain formalities are met. The latter ordinarily include the listing of the creditors and advance notice to them. Under some statutes there is also an affirmative obligation upon the transferee to make certain that the proceeds of the sale are applied to the debts. Kentucky's Bulk Sales statute was of the type which did impose upon the transferee this additional responsibility,[127] and the Uniform Commercial Code adopts the Kentucky version in this respect.[128]

Shifting to creditors of the buyer, there is special protection in connection with the provisions regarding sale on approval and sale or return. Section 2-326(3) deems goods to be on sale or return where the goods are delivered for sale to a person who "maintains a place of business at which he deals in goods of a kind involved", resulting in protection for claims of creditors of the person conducting the business.[129] This rule applies although the agreement reserves title in the deliveror of such goods or uses words like "on consignment" or "on memorandum".[130] The deliveror is, however, permitted to protect himself effectively against creditors of the person in possession in either of three ways: (1) compliance with an applicable law providing for consignor's interest to be evidenced by a sign, or (2) establishing that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or (3) compliance with the filing provisions of Article 9 for protection of a security interest against creditors.[131]

THE CONTRACT OF SALE

Special contract principles for commercial sales: Perhaps the most significant of all the changes in Kentucky sales law are the extensive reforms in the orthodox legal principles relating to the formation, effect and modification of contracts for the sale of goods. Space limitations, again, necessitate full treatment in

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127 KRS §377.040.

128 UCC §6-106. See Dorsey, "Bulk Transfers," 48 Ky. L.J. 244-250 (1959).

129 It will be recalled that the effect of a "sale or return" transaction is to transfer such an interest to the buyer that the buyer's creditors may reach the goods despite the buyer's option to return the goods if not sold, whereas if goods are held on approval the buyer's creditors cannot reach the goods before buyer accepts. UCC §2-326(2). See also text following note 107 *supra*.

130 UCC 2-326(3).

131 UCC §2-326(3)(a)(b)(c).

another installment, but the following reforms are listed as especially noteworthy:

(1) Abandonment of the strict common law requirement of consideration to sustain (a) written firm offers of limited duration by merchant buyers or sellers;[132] (b) good faith modification, rescission or waivers of contracts for sale;[133] and (c) written renunciation of a claim or right as a result of breach;[134]

(2) An attack upon injustices relating to offer and acceptance in the formation of contracts, especially in regard to manner of acceptance of ambiguous offers, elimination of the present unfair advantage had by the seller-offeree in making a non-conforming shipment, as well as in beginning performance under offers for a unilateral contract;[135]

(3) An attack on the battle of the forms through new provisions permitting valid contracts to be made despite additional or variant terms, with differentiation depending upon whether merchants or non-merchants are involved;[136]

(4) Clarification, with added flexibility, of the rules requiring definiteness of contractual provisions as to price,[137] quantity in terms of seller's output or buyer's requirements,[138] duration,[139] parties' options and duty to cooperate.[140]

Statute of frauds: The Code continues the statute of frauds requiring a writing to render enforceable a contract for the sale of goods for the price of $500 or more, eliminating, however, several injustices which had become firmly engrained through several hundred years of judicial construction. First, the requirements as to the type of writing which will satisfy the statute have been liberalized so that the writing is sufficient if it indicates that a contract has been made even though it does not state all its essential terms.[141] Second, a new provision binds a merchant,

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[132] UCC §2-205.
[133] *Id.* §2-209.
[134] *Id.* §1-107.
[135] *Id.* §2-206.
[136] *Id.* §2-207.
[137] *Id.* §2-305.
[138] *Id.* §2-306. Examination of cases like Heidelberg Brewing Co. v. E. F. Prichard Co., 297 Ky. 788, 180 S.W. 2d 849 (1944) reveals how closely some courts had already come to reaching the Code's summation of result.
[139] *Id.* §2-309.
[140] *Id.* §2-311.
[141] *Id.* §2-201(1) ("... some writing sufficient to indicate that a contract for sale has been made ...").

who receives a letter of confirmation of a contract for sale, to send within ten days a written notice of rejection of its contents or else become bound by the contract, just as the other party is bound.[142] This eliminates the previous advantage enjoyed by the party who did not put his offer in writing, under judicial interpretation of the phrase in old statute, "party to be charged",[143] and is in accord with reasonable business practices of honest merchants. Third, there is a narrowing of the effect of receipt and acceptance of part of the goods or part payment. Under the new provision the only part of the contract taken outside the statute's operation by this exception is that part of the goods actually received by the buyer or that part with respect to which the part payment was actually made, as contrasted with previous law under which the entire contract could be brought outside the statute's protection by part performance of only a very small fraction of the total.[144] There is no change in the exception relating to specially manufactured goods and no radical change in the provision relating to admission in open court by the party to be charged "in his pleading, testimony or otherwise".[145] Another formality, immediately following the statute of frauds, relates to the rules of evidence in regard to written agreements and parol evidence and codifies matter previously to be found in court decisions.[146]

Warranties: The reader is referred to the excellent article in this issue which fully compares the Code provisions with existing Kentucky law.[147] Though largely a codification of existing law, the changes which seem most significant are: (1) the redefinition of express and implied warranties to include warranties in sales by description and by sample within the express warranty category;[148] (2) the elimination of the "trade name" exception to implied warranties in accord with the better reasoned judicial doctrine;[149] (3) the partial settlement of the privity problem to give the buyer's family, household and guests the

142 *Id.* §2-201(2).
143 USA §4, WRS 361.040.
144 UCC §2-201(3)(c).
145 UCC §2-201(3)(b).
146 UCC §2-202.
147 See Note 2 *supra.*
148 UCC §2-313.
149 UCC §2-315, Comment 5.

benefit of all warranties running to the buyer;[150] (4) some limits placed upon disclaimer clauses;[151] and (5) a recognition, such as appears throughout the sales article, of the competency of the parties to make their own agreement, consistent only with fair play.[152]

CONCLUSION

One by-product of the new law affects the drafting of sales contracts, of purchasers' orders and suppliers' acknowledgment forms. New, but shorter, forms may be expected. Under the step-by-step prescription of the legal consequences of most phases of the sales agreement, many form clauses formerly used to take care of especially worrisome trouble spots will no longer be necessary. Further, under the policy of freedom of the parties to make their own agreement within reasonable limitations, special contract stipulations should be more easily drafted to accomplish the client's individual objectives. Kentucky lawyers will be happy that the present law relating to auction sales, and in fact innumerable other matters, remains substantially the same under article 2 as before.

It is true that in some of the states adopting the Sales Act, courts have sometimes consistently failed to cite the applicable statutory provision, relying upon the common law for their decisions.[153] Perhaps this has been due to the habit of lawyers of thinking in common law principles. Usually little harm has been done by ignoring the statutory provision because the Sales Act was largely a codification of the common law anyway. Will it or no, this cannot happen under the Code. There are too many departures from previous law which the attorney cannot afford to overlook. He must know how the Code affects his case, else it might well be the opposing attorney who brings the provision to light—to win the case.

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150 UCC §2-318.
151 UCC §2-316(1)(2).
152 UCC §2-316.
153 For example: failure to cite on particular provisions relating to standing timber, see Johnson, "Sales—A Comparison of the Law in Washington and the Uniform Commercial Code", 34 Wash. L. Rev. 78, 89-90 (1959); in Arkansas during the first six years after enactment the Sales Act was cited once, in passing, by the highest court, though there were many cases in which the court could have cited the Act. See article, "Effect of Adoption of the Uniform Sales Act Upon Arkansas Law," 1 Ark. L. Rev. 122 (1947).